***United States Court of Appeals***

***for the Second Circuit***

# SUPPLEMENTAL BRIEF

ORIGINAL WITH PROOF OF SERVICE

77-7163

To be argued by
SAMUEL K. ROSEN

# UNITED STATES COURT OF APPEALS

*for the*

# SECOND CIRCUIT

B
P/S

LEO M. SHORE,

Plaintiff-Appellant,

vs.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

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PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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## SUPPLEMENTAL BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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Docket No. 77-7163

LEO M. SHORE,

Plaintiff-Appellant,

vs.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants,

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

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# SUPPLEMENTAL BRIEF FOR APPELLANT

## PRELIMINARY STATEMENT

This appeal is from an order dated January 14, 1977, wherein the Hon. Inzer B. Wyatt denied plaintiff's motion for summary judgment against defendant Parklane Hosiery Company, Inc. ("Parklane") and Herbert N. Somekh ("Somekh") based on the doctrine of collateral estoppel. By notice of motion dated August 11, 1977, plaintiff-appellant moved for leave to file a supplemental brief to include the fact that the decision which plaintiff-appellant seeks to apply by estoppel was affirmed by this Court subsequent to the filing of the briefs on the instant appeal. By order dated August 25, 1977, the Hon. Walter

R. Mansfield granted plaintiff-appellant leave to file a supplemental brief.

## THE CASE

This action is based upon a false and misleading proxy statement dated September 24, 1974 (the "Proxy Statement") which, the complaint alleges, fraudulently led to a merger in which the public shareholders of Parklane were bought out of Parklane. This class action was commenced in the Southern District of New York on November 13, 1974 against Parklane and Somekh and twelve other defendants who were officers, directors and/or shareholders of Parklane at the date of the above merger. The action was certified as a class action by order dated May 2, 1975.

Plaintiff alleged in his complaint that the Proxy Statement was false and misleading in three basic respects, as set forth in the brief for appellant at pp. 3-5.

In May 1976, the Securities and Exchange Commission ("SEC") commenced an action in the Southern District of New York against Parklane and Somekh alleging that the Proxy Statement was false and misleading (the "SEC action"). After trial in the SEC action, the Hon. Kevin Duffy, in an Order and Opinion dated November 9, 1976, held that the Proxy Statement was materially false and misleading in the same respects as alleged by plaintiff.

Plaintiff moved for summary judgment based on the

doctrine of collateral estoppel because, by virtue of the Opinion and Order in the SEC action, no genuine issues of material fact remained between the plaintiff class and defendants Parklane and Somekh. This motion was denied, but was certified to this Court pursuant to 28 U.S.C. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure. By order dated April 5, 1977, this Court granted leave to appeal.

Defendants Parklane and Somekh appealed the decision of Judge Duffy in the SEC action and subsequent to the filing of all briefs in the instant appeal, the United States Court of Appeals for the Second Circuit affirmed the decision of Judge Duffy in the SEC action in an opinion dated July 8, 1977, appeal docket nos. 77-6012 and 77-6023. The court specifically affirmed that the Proxy Statement was misleading in all respects alleged by the SEC and as claimed by the instant plaintiff-appellant at pp. 3-6 of appellant's main brief. Specifically, this Court held:

> (a) The record supports the district judge's finding that the "overriding purpose" for the going-private scheme was to enable Somekh to repay his personal indebtedness.
>
> * * *
>
> We find that there was substantial evidence for the district judge to find, "It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the proxy statement. The non-disclosure is clearly established." (Opinion at 4634-4635).

(b) The court found, and we concur, that the October 4th conference fell within the common usage of the term "negotiation," and thus, the unamended proxy statement was false when it stated that "there are no negotiations at present." (Opinion at 4637.)

(c) The third area in which the court found a failure to disclose material facts relates to the appraisal conducted by one of two investment banking firms, Thomson & McKinnon, Auchincloss and Kohlmeyer, Inc.

* * *

We find that his decision on this issue was not clearly erroneous. (Opinion at 4637-4638.)

This Court also affirmed Judge Duffy's holding that each of these misstatements in and omissions from the Proxy Statement were material in light of the standard set forth in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976). (Opinion at 4638-4642.)

Plaintiff-appellant noted in passing at p. 12 of his reply brief that the decision of the District Court in the SEC action had been appealed. As plaintiff-appellant there indicated, the District Court decision in the SEC action was sufficiently final for purposes of according it collateral estoppel effect. It is now clear that defendants-appellees have not only had a full and fair adjudication, in a three-day trial, of the factual issues presented in the instant action,

but the findings of the court in that full and fair adjudication have been upheld on appeal. The misstatements in and omissions from the Proxy Statement have already been litigated and determined in a prior action, and a final judgment rendered and affirmed on the merits. Since it no longer is " . . . tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328 (1971), plaintiff-appellant is entitled to collateral estoppel effect of the facts already determined.

## CONCLUSION

For the reasons stated above and in plaintiff-appellant's Main and Reply Briefs, it is respectfully submitted that relitigation of these facts is not required, the Court below improperly denied plaintiff-appellant's motion for summary judgment and the question certified to this Court should be answered in the affirmative.

Respectfully submitted,

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STATE OF NEW YORK )
COUNTY OF NEW YORK) ss .

Ruben Calle, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 33-33 82nd St. Jackson Hts. 11372.

That on the 6 day of SEPTEMBER, 1977, deponent personally served the within SUPPLEMENTAL BRIEF FOR APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

JACOBS PERSINGER & PARKER
ATTORNEYS FOR DEFENDANTS-APPELLEES
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NEW YORK, N.Y.

Ruben Calle

Sworn to before me this
6th day of September, 1977 Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979